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management will hesitate to offer employee benefits in the future, and labor will suffer in the end.

The need for remedial legislation is evident. It has been suggested by management that the Act be amended to exclude specifically from the area of required collective bargaining certain subjects which have traditionally been considered, because of their nature, within the exclusive domain of management, *e.g.*, health, welfare benefit, and stock purchase plans.[59] The Act would thereby provide the Board with a more definite framework or basis for deciding what is within or without the scope of compulsory bargaining. Alternatively, the Board should, on its own initiative, set up rules defining those areas where management is free to act unilaterally without apprehension of interference or intrusion by labor through the Board's decisions.

USE OF A FOREIGN TRUST TO AVOID THE NEW YORK RULE AGAINST PERPETUITIES

Introduction

The purpose of the Rule against Perpetuities has been to preserve the alienability of property.[1] The Rule terminated an historic conflict between the English landlords and the common-law courts. The landlords' desire to keep estates in the family line for as long as possible was at cross purposes with the policy of the English courts, which were by tradition in favor of freedom of alienation.[2] Although the

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with the advancement of working conditions and employee benefits without the prodding of collective bargaining can no longer improve the lot of their employees without first bargaining with their union. This is not conductive to further voluntary improvement of the employee's status because the employer will have to await the union's demand because he knows that if he makes an offer, the union will pyramid something on top of that offer so that they can claim credit for it. Employers, knowing this, will make no voluntary offers and will give way slowly to the union demands and will make every effort short of having a strike to keep the benefits at the least possible level consistent with the industry level. They cannot afford to volunteer any improvements or grant any more benefits because if they make an offer of X amount, they know the union will demand X plus." *Id.* at 10.

[59] See *Hearings before Committee on Education and Labor of the House of Representatives*, 83d Cong., 1st Sess. 1080-1082, 1100-1102, 2208, 3545-3546 (1953).

[1] See GRAY, THE RULE AGAINST PERPETUITIES 297 (4th ed. 1942); POWELL, CASES AND MATERIALS ON THE LAW OF TRUSTS 299 (1940).

[2] See 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW 193-202 (2d ed. 1937); CASNER AND LEACH, CASES AND TEXT ON PROPERTY 275 (1951).

conflict was eventually resolved in favor of alienability, this solution was opposed at every stage of its development. Thus, after judicial decision had permitted the use of a common recovery to disentail estates,[3] landlords prevented alienation by subjecting property to indestructible future contingent interests.[4] To prohibit this last device, the Rule against Perpetuities was devised.[5]

In effect, the common-law Rule established a limitation on the period during which property could be made inalienable by being subjected to a future interest.[6] Under this Rule, future interests were invalid unless they were to vest not later than lives in being at the creation of the interest plus twenty-one years.[7] The common-law Rule against Perpetuities has been codified by the majority of the states. The Rule prevails without substantial modification in about three-fourths of the states, and is accepted with slight variations by an additional eleven states.[8]

The New York Rule

The New York Rule against Perpetuities represents an exception to the general approval accorded to the common-law Rule and, with the possible exception of Arizona, has no parallel in any other state.[9] When New York departed from the common-law Rule in 1828,[10] instead of limiting remoteness of vesting on the common-law basis of plural lives, a "two-life" limitation was adopted.[11] Today, as a result of this action, the permissible period of inalienability is shorter in New York than in any other jurisdiction.[12] In addition, the construction which the New York courts have given the New York Rule in attempts to mitigate some of its mischievous consequences has caused the Rule to become particularly obscure.[13] As a

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[3] See GRAY, *op. cit. supra* note 1, at 139.

[4] *Id.* at 297.

[5] *Ibid.*

[6] See POWELL, CASES AND MATERIALS ON THE LAW OF TRUSTS 299-300 (1940); SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 367 (1951).

[7] See GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

[8] See 1936 LEG. DOC. No. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 130-133 (1936).

[9] *"Thus the two-life rule has no recognition outside of Arizona, Michigan, Minnesota and New York; applies nowhere but in New York to dispositions of personalty and has been rendered of negligible importance in both Michigan and Minnesota."* *Id.* at 134. In 1949 the Michigan Rule against Perpetuities was repealed and the common-law Rule adopted. MICH. STAT. ANN. § 26.49(1) (Supp. 1953).

[10] N.Y. REV. STAT. 1829, c. 1, tit. 2, §§ 13-16.

[11] "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate. . . ." N.Y. REAL PROP. LAW § 42.

[12] See POWELL, CASES AND MATERIALS ON THE LAW OF TRUSTS 303 (1940).

[13] See 1936 LEG. DOC. No. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 119, 121 (1936).

result, its labyrinthine ways hinder the average lawyer in an important part of his practice.[14] The consequence of the New York Rule against Perpetuities, as stated by Professor Gray, is that ". . . in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York." [15]

It is difficult to find any justification for the two-life limitation adopted in New York. On the contrary, many factors indicate that the present Rule should be repudiated. One of these factors is the uniqueness of the New York Rule. It is clear that this singularity is not justified by a public policy in any way different from that of the rest of the nation.[16] Moreover, the New York Rule is ill-conceived. Rules against Perpetuities seek, in general, to limit the duration of inalienability. The period of suspension does not depend, however, on the number of lives in being at the creation of the estate, but rather upon the longevity of the measuring lives chosen.[17] However, the most serious of the objections raised against the New York Rule is its adverse consequences to the residents of New York State. In addition to the possibility that the testator's will may fail because of the Rule's obscurities,[18] it is simply not suited to the average family with more than one child.[19] Furthermore, the Rule is the occasion of an unequal federal estate tax burden.[20] Under the common-law Rule, a trust may be created which postpones the estate tax until the death of the last beneficiary. The only limitation under the common law is that the beneficiary must have been alive at the creation of the

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[14] *Ibid.*

[15] GRAY, THE RULE AGAINST PERPETUITIES 687 (4th ed. 1942). But see Finkelstein, *Notes on the New York Rule Against Suspension of the Power of Alienation,* 5 ST. JOHN'S L. REV. 1, 10 (1930).

[16] See Russell, *Proposed Changes in the New York Rule Against Perpetuities,* 6 ST. JOHN'S L. REV. 50, 67 (1931).

[17] See Thellusson v. Woodford, 11 Ves. 112, 145-146, 32 Eng. Rep. 1030, 1043 (1805); see Russell, *supra* note 16, at 58-60.

[18] See 1936 LEG. DOC. NO. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 120 (1936).

[19] ". . . [C]*ertain types of reasonable settlements are impossible under our restricted permissible period:*

"A testator cannot provide a trust fund for the benefit of his children (if more than two) until all reach majority (or other age), so as to secure the advantages of flexibility, varying distribution of income and successive gifts over to survivors until the youngest living survivor reaches twenty-one. A fortiori, a testator cannot set up an indivisible trust for more than two children, or other beneficiaries, during their lives. . . .

"A testator can set up a trust for the benefit of his son for life but he cannot ordinarily require the continuance of the trust for the benefit of his son's children until they reach majority unless the benefit is limited to children in being at the testator's death. Even then either a finding of separate trusts at the death of the son or measurement upon the life of one child is requisite." 1936 LEG. DOC. NO. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 121-122 (1936).

[20] See Looker, *Practical Effects of Differences in the Rule against Perpetuities,* 90 TRUSTS & ESTATES 653 (1951).

trust. In New York, however, the estate tax cannot be postponed beyond the death of two beneficiaries, and thus must be paid more frequently than under the common-law Rule.[21]

In light of the many disadvantages of the New York Rule against Perpetuities, the law in jurisdictions which follow the common-law Rule seems preferable. There appear to be at least two methods whereby New York residents may obtain the benefit of the more suitable common-law Rule. One method is direct—statutory amendment modeled after the Rule against Perpetuities of another state.[22] In lieu of that, however, an indirect method may be possible—creation of an extraterritorial trust whose validity is governed by the Rule in force in another jurisdiction.[23]

Avoiding the New York Rule

Before examining the New York decisions bearing upon the success or failure of this latter proposal, it is necessary to demarcate the scope of the problem. To begin with, it is futile to employ this device in situations involving trusts of real property. Where realty is involved, it is completely impossible to effect the application of a Rule against Perpetuities other than that in force at the situs of the land transferred.[24] The law of the situs governs real property trusts regardless of the domicile of any of the parties, or the mode of transfer.[25]

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[21] *Ibid.*

[22] Although the movement to alter the New York Rule against Perpetuities seems to have spent its former energy, a recent proposal has been made to reinstate the common-law Rule as to the immediate family. See COMMITTEE ON LAW REFORM, REPORT ON PROPOSED CHANGES IN THE STATUTES OF NEW YORK RELATING TO THE RULE AGAINST PERPETUITIES AND TO RESTRAINTS UPON ALIENATION, 2 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 37 (1947).

[23] In this connection Professor Russell has stated that the New York Rule against Perpetuities is the best asset of trust companies in states contiguous to New York. See Russell, *Proposed Changes in the New York Rule Against Perpetuities,* 6 ST. JOHN'S L. REV. 50, 66 (1931). "Moreover, variations in state income, property, and estate tax laws often make the creation of a trust in a state other than that of the settlor's residence a profitable arrangement." Cavers, *Trusts* Inter Vivos *and the Conflict of Laws,* 44 HARV. L. REV. 161, 162 (1930). The advantages thus derived, which in addition include satisfaction of the estate program and decreased federal estate tax burden, must be balanced against the possibility of double taxation.

[24] Hobson v. Hale, 95 N.Y. 588 (1884); Knox v. Jones, 47 N.Y. 389 (1872); *see* Trowbridge v. Metcalf, 5 App. Div. 318, 320, 39 N.Y. Supp. 241, 242 (1st Dep't 1896), *aff'd mem. sub nom.* Trowbridge v. Trowbridge, 158 N.Y. 682, 52 N.E. 1126 (1899). See N.Y. DEC. EST. LAW § 47. Since the policy against perpetuities concerns the manner in which property is *held* within a certain jurisdiction (see note 39 *infra*), the nature of real property makes it impossible to avoid the operation of the Rule. The situation is manifestly different where trusts of movables are concerned.

[25] See GRAY, THE RULE AGAINST PERPETUITIES 283 (4th ed. 1942). Since personal property is not so jealously guarded, the conflict of laws principles

In general, where the elements of a trust are distributed between two or more jurisdictions, the courts, in determining the particular law which governs the trust, will consider the various contacts of the trust with the jurisdictions involved.[26] Originally, the domicile of the creator of the trust was the sole jurisdictional contact considered,[27] but more recently, non-domiciliary law, *i.e.*, the law of the situs or the place of administration, has been held to govern.[28] This recent tendency is noteworthy since, if followed in New York, it would enable a New York domiciliary to satisfy his preference for the Rule against Perpetuities of another jurisdiction. On the other hand, if New York were to follow the older view, the application of the law of the creator's domicile would frustrate any such choice. In view of this polarity, the particular direction the New York courts have embarked upon is highly significant. Whether or not they apply domiciliary or non-domiciliary law when faced with a problem involving the suspension of the power of alienation, should determine the result of any attempt to obtain the benefit of a foreign Rule against Perpetuities.

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governing real property may be avoided if the transferor directs conversion of his realty into personalty. By virtue of the doctrine of equitable conversion, where a testamentary disposition is made, the testator is considered as dying seized of personal property. The conflict of laws principles governing trusts of personal property consequently govern the trust. See, *e.g.*, Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Chamberlain v. Chamberlain, 43 N.Y. 424 (1871).

[26] *Cf.* Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953). See Swabenland, *The Conflict of Laws in Administration of Express Trusts of Personal Property*, 45 YALE L.J. 438 (1936). "In the absence of an express statement by the settlor as to which law is intended to govern, the courts have referred to and considered the following factors to determine the governing law:

1. The domicil of the creator of the trust.
2. The place in which the trust deed was executed.
3. The language of the trust instrument.
4. The place of probate of the will.
5. The location of the trust property.
6. The domicil of the trustee.
7. The domicil of the beneficiary.
8. The place in which the business of the trust is carried on.
9. The intention of the creator." *Id.* at 442-443. In this article, discussion of the jurisdictional contacts will be limited to the domicile of the creator and the situs or the place of administration of the trust. In addition, the particular law governing interpretation, matters of form, administration, *etc.*, will not be considered except in relation to the Rule against Perpetuities.

[27] See STORY, CONFLICT OF LAWS § 383 (1834). ". . . [T]he laws of the owner's domicil should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or *post mortem*." For a criticism of this view, see CHESHIRE, PRIVATE INTERNATIONAL LAW 559-565 (3d ed. 1947).

[28] See notes 32 and 33 *infra*. It has been indicated that non-domiciliary law may be applied to sustain a trust provided the creator selects ". . . the law of a state which has some substantial connection with the trust." LAND, TRUSTS IN THE CONFLICT OF LAWS 116, 118 (1940).

An inter vivos or testamentary personal property trust may be created which violates the New York Rule against Perpetuities. If the trust has been created by a New York domiciliary and is to be administered in New York, the trust will clearly fail. However, a trust may be sustained if the domicile of the creator is in one state and the situs or place of administration is in another state. This may occur in one of two ways.

One possibility is that the creator of the trust may be a domiciliary of a foreign state where the trust conforms to the Rule against Perpetuities. In this situation, although an inter vivos [29] or testamentary [30] trust has been created which violates the New York Rule, and the trust is to be administered in New York, it will be sustained by the New York courts.[31]

On the other hand, a trust may be created which violates the Rule against Perpetuities of the creator's domicile, but is in conformity with the law of the place of administration. Under these conditions inter vivos trusts have been treated differently from testamentary trusts. Although there are few New York cases involving the suspension of the power of alienation by a New York domiciliary, if the trust is inter vivos it will probably be sustained.[32] New York courts have applied the law of the situs to uphold inter vivos trusts which were invalid at the creator's domicile but valid at the place of situs.[33]

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[29] Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937); Townsend v. Allen, 59 Hun 622, 13 N.Y. Supp. 73 (Gen. T. 1st Dep't), *aff'd mem.*, 126 N.Y. 646, 27 N.E. 853 (1891); *see* Curtis v. Curtis, 185 App. Div. 391, 395, 173 N.Y. Supp. 103, 105 (1st Dep't 1918). *But see* City Bank Farmers Trust Co. v. Cheek, 202 Misc. 303, 307, 110 N.Y.S.2d 434, 437 (Sup. Ct. 1952).

[30] Dammert v. Osborn, 140 N.Y. 30, 35 N.E. 407 (1893); Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892); Guaranty Trust Co. v. Leach, 168 Misc. 526, 5 N.Y.S.2d 628 (Sup. Ct. 1938); Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636 (1894). *Contra:* Matter of Clarkson, 201 Misc. 943, 107 N.Y.S.2d 289 (Surr. Ct. 1951), 1 BUFFALO L. REV. 307 (1952). Since the policy against perpetuities concerns the manner in which property is held in a certain jurisdiction (see note 39 *infra*), it would seem to follow that if a trust is invalid where it is to be administered, the trust should be overturned although it is valid under the law of the creator's domicile. The courts have not, however, reached this conclusion, apparently because of the insignificant variations in the Rule against Perpetuities in the various states. No strong local policy is violated if property is held in the state without conforming to local law. *See* Cross v. United States Trust Co., *supra* at 341-343, 30 N.E. at 127-128; Whitney v. Dodge, *supra*, 38 Pac. at 638.

[31] This result has been reached in other jurisdictions. See Liberty Nat. Bank & Trust Co. v. New England Investors Shares, Inc., 25 F.2d 493 (D. Mass. 1928), 27 MICH. L. REV. 464 (1929).

[32] See Robb v. Washington & Jefferson College, 185 N.Y. 485, 78 N.E. 359 (1906) (charitable beneficiary); *see* Matter of Griswold, 99 N.Y.S.2d 420, 428-432 (Sup. Ct. 1950). This result has been reached in foreign jurisdictions. See Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1942); Second Nat. Bank v. Curie, 116 N.J. Eq. 101, 172 Atl. 560 (Ct. Err. & App. 1934).

[33] See Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933), 33 COL. L. REV. 1251; *accord,* Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co., 14 Del. Ch. 332, 127 Atl. 56 (Ch. 1924).

No distinction based on the Rule against Perpetuities in the settlor's domicile seems to have been made in the cases.[34] Instead, the courts have concerned themselves with the law which governs the validity of trusts in general.[35]

The law governing testamentary trusts presents an entirely different problem.[36] The testamentary trust derives its legal significance from the testator's will, and the validity of the will, matters of interpretation, form, *etc.*, are usually governed by the law of the testator's domicile.[37] Similarly, the Rule against Perpetuities may govern the validity of a will. Therefore, on the surface it would appear that a conflict of laws problem which involves the suspension of the power of alienation should be resolved by reference to the Rule in force at the testator's domicile.[38] This apparently logical conclusion is refuted, however, by the reasoning underlying the policy against perpetuities.

The Rule against Perpetuities is aimed at the *holding* (not the transfer) of property within the jurisdiction for a period of time deemed contrary to public policy.[39] Since that "holding" obviously takes place in the state where the trust is to be administered, it would appear that the validity of a trust should be determined according to the Rule against Perpetuities in force at the place of administration.[40]

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[34] See Cavers, *Trusts* Inter Vivos *and the Conflict of Laws,* 44 HARV. L. REV. 161, 167 (1930).

[35] *Ibid.*

[36] The different treatment given inter vivos and testamentary trusts may perhaps be due to the fact that in determining the validity of an inter vivos trust it is extremely doubtful which law governs, whereas in the case of a testamentary trust reference is first made to the testator's will. See GRAY, THE RULE AGAINST PERPETUITIES 284 (4th ed. 1942).

[37] See Cavers, *supra* note 34, at 162-163; RESTATEMENT, CONFLICT OF LAWS §§ 306, 308 (1934).

[38] See 2 BEALE, CONFLICT OF LAWS § 294.7 (1935), citing Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892); SHATTUCK AND FARR, AN ESTATE PLANNER'S HANDBOOK 282 (2d ed. 1953). But see GOODRICH, CONFLICT OF LAWS 490-491 (3d ed. 1949), citing Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892). Both the *Cross* and the *Hope* cases were decided by the New York Court of Appeals in 1892, with Judge O'Brien writing the decision each time. Far from being inconsistent, Judge O'Brien expressed the view in the *Hope* case that the court was merely required to ". . . go a step farther and hold another but a kindred proposition. . . ." *Id.* at 139, 32 N.E. at 562.

[39] *See* Hope v. Brewer, *supra* note 38 at 138, 32 N.E. at 561; Kurzman v. Lowy, 23 Misc. 380, 382-383, 52 N.Y. Supp. 83, 85 (Sup. Ct. 1898); see Cavers, *Trusts* Inter Vivos *and the Conflict of Laws,* 44 HARV. L. REV. 161, 165 (1930). Professor Beale recognized this proposition in relation to local statutes applicable to charitable bequests. See Beale, *Equitable Interests in Foreign Property,* 20 HARV. L. REV. 382, 393-394 (1907).

[40] See 2 WHARTON, CONFLICT OF LAWS 1321-1322 (3d ed. 1905); RESTATEMENT, CONFLICT OF LAWS § 240, comment *b* (Proposed Final Draft No. 2, 1931); Note, 32 COL. L. REV. 680, 683 (1932). The final draft of the *Restatement* does not mention perpetuities, however. Instead, the general rule is stated: "The validity of a trust of movables created by a will is determined by the law of the testator's domicil at the time of his death."

In any event, it is obvious that the policy of the Rule in force at the testator's domicile is not violated if the property is to be removed from the state and held in another jurisdiction.[41] In such case, there is no reason why the courts of the testator's domicile should pursue the fund and see that it is held in strict harmony with their law.[42] This is especially true if to do so would cause a trust, which is otherwise valid, to be overturned.

The nature of the legal restriction in the testator's domicile should be considered before a specific domiciliary law is held to govern a testamentary disposition. Although as a general rule it is true that the law of the testator's domicile governs the validity of a will, this should be true only so far as the formal requisites of the will, the capacity of the testator, and the construction of the will are concerned.[43] It should not apply for the purpose of regulating the manner in which property is held in another jurisdiction.[44] Thus, the rule in New York is, as stated by Professor Whiteside:

> Where the designated trustee of a personal property trust is a corporation created by and located in another state, and the fund is to be there held and administered, and the trust is legal under the laws of the foreign state the courts of New York will transmit the fund to the foreign jurisdiction to be held on the trusts indicated, even though such trusts would be void as suspending the power of alienation in New York.[45]

Although from the above it would seem clear in principle that the Rule against Perpetuities in force at the place of administration should govern the validity of a trust, the few authorities that exist on this question are divided. New York courts have rarely had to determine whether the Rule in force at the place of administration or that in force at the testator's domicile governed a testamentary trust. In *Cross v. United States Trust Co.*, it was held that domiciliary law

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RESTATEMENT, CONFLICT OF LAWS § 295 (1934). The *Restatement's* silence has been interpreted by Professor Gray as leaving the question open. See GRAY, THE RULE AGAINST PERPETUITIES 290 n.7 (4th ed. 1942).

[41] *See* Hope v. Brewer, *supra* note 38 at 142, 32 N.E. at 562; Manice v. Manice, 43 N.Y. 303, 388-389 (1871); Stieglitz v. Attorney-General, 91 Misc. 139, 141, 154 N.Y. Supp. 137, 138 (Sup. Ct. 1915); Kurzman v. Lowy, *supra* note 39 at 382-383, 52 N.Y. Supp. at 85; Draper v. Harvard College, 57 How. Pr. 269, 271 (N.Y. Sup. Ct. 1879).

[42] *See* Hope v. Brewer, *supra* note 38 at 140, 32 N.E. at 562; Chamberlain v. Chamberlain, 43 N.Y. 424, 434 (1871); Manice v. Manice, *supra* note 41.

[43] *See* Hope v. Brewer, 136 N.Y. 126, 142, 32 N.E. 558, 562 (1892); Stieglitz v. Attorney-General, *supra* note 41 at 142, 154 N.Y. Supp. at 138; see CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION § 525 (1891).

[44] *See* Hope v. Brewer, *supra* note 43; see CHAPLIN, *op. cit. supra* note 43, § 530.

[45] Whiteside, *Suspension of the Power of Alienation in New York*, 13 CORNELL L.Q. 31, 39 (1927). See also GRAY, THE RULE AGAINST PERPETUITIES 289 (4th ed. 1942); 1936 LEG. DOC. No. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 69 (1936).

governed.[46] In the *Cross* case a foreign domiciliary had created a trust to be administered in New York. Although the trust established a perpetuity in contravention of New York law, it was sustained on the ground that it was valid at the testator's domicile in Rhode Island. It should be noted, however, that in the *Cross* case the application of domiciliary law *sustained* the trust. Moreover, the *Cross* case involved a trust created in another state to be administered in New York, not the converse situation where a trust is created by a New York domiciliary to be administered in another state. The question naturally arises, therefore, whether a contrary result might occur when, in the latter situation, to apply domiciliary law would *invalidate* the trust.

New York courts have in fact upheld such trusts. In a series of cases involving foreign charitable beneficiaries, trusts which created perpetuities prohibited by New York law have been sustained through the application of the Rule against Perpetuities in force at the place of administration.[47] But despite the broad language in these cases,[48] it has nevertheless been implied that the application of the Rule against Perpetuities of the place of administration is *confined* to charitable trusts and that the law of the testator's domicile otherwise governs.[49] A recent lower-court case, *Matter of Samuels*,[50] bears out this view. There, the court decided that a testamentary trust of personal property was invalid by virtue of the New York Rule against Perpetuities although it was valid in Massachusetts where it was to be administered. This case appears to stand alone in adopting such a position, however.

Prior to the *Samuels* case, the problem of selecting the Rule against Perpetuities to govern a testamentary trust created by a New York domiciliary to be administered elsewhere, seems to have arisen solely in connection with charitable beneficiaries. Although it was true that the law of the place of administration had been applied to

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[46] 131 N.Y. 330, 30 N.E. 125 (1892). See also Dammert v. Osborn, 140 N.Y. 30, 35 N.E. 407 (1893); Guaranty Trust Co. v. Leach, 168 Misc. 526, 5 N.Y.S.2d 628 (Sup. Ct. 1938); Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636 (1894). *Contra:* Matter of Clarkson, 201 Misc. 943, 107 N.Y.S.2d 289 (Surr. Ct. 1951).

[47] See Hope v. Brewer, *supra* note 43; Chamberlain v. Chamberlain, 43 N.Y. 424 (1871); Manice v. Manice, 43 N.Y. 303 (1871); Matter of Grant, 200 Misc. 35, 101 N.Y.S.2d 423 (Surr. Ct. 1950); Matter of Feehan, 135 Misc. 903, 241 N.Y. Supp. 669 (Surr. Ct. 1929).

[48] See notes 39, 41-44 *supra*.

[49] *See* Hutchison v. Ross, 262 N.Y. 381, 391, 187 N.E. 65, 69 (1933); see 2 BEALE, CONFLICT OF LAWS § 294.7 (1935). This view is opposed to the result reached in several foreign jurisdictions where *private* testamentary trusts which were invalid under the law of the testator's domicile were sustained through the application of the law of the place of administration. See, *e.g.*, Matter of Chappell, 124 Wash. 128, 213 Pac. 684 (1923); Fordyce v. Bridges, 2 Ph. 497, 515, 41 Eng. Rep. 1035, 1042 (1848).

[50] 205 Misc. 368, 128 N.Y.S.2d 349 (Surr. Ct. 1954).

sustain charitable trusts and no others, it could only be conjectured what the result would be when a case appeared involving a non-charitable beneficiary. When a case did appear for what seems to be the first time, in *Matter of Samuels,* the law was simply stated, without being considered at length in the decision. The court's only reason for its decision was that testamentary dispositions of property are in general governed by the rules in force at the testator's domicile.

There does not seem to be any logical basis for distinguishing between charitable and non-charitable testamentary trusts.[51] Though it is true that the courts are more inclined to save the former, the purpose of the Rule against Perpetuities is the same regardless of the public benefits to be expected from the trust. In either case the objective of the Rule is not fulfilled by requiring that property be held in foreign jurisdictions in conformity with New York law. Moreover, the material difference between the law of domicile and the place of administration is so slight that New York courts should not fear that their public policy would be diluted by the application of foreign law to transfers by New York domiciliaries.[52] Furthermore, the result in the *Samuels* case is contrary to the tendency of New York courts to mitigate the harsh consequences of the New York Rule and to sustain a trust wherever possible.

Conclusion

New York courts have, as a rule,[53] demonstrated a tendency which would sustain both inter vivos and testamentary trusts (1) where they are created in another jurisdiction to be administered in New York, and conversely, (2) where they are created by a New York domiciliary to be administered elsewhere.[54] In the first instance, the trusts were sustained through the application of the law of the creator's domicile, and in the second instance, through the application of the law of the situs or the place of administration. Thus it would appear that neither the domicile of the creator nor the situs or the place of administration can be said to be the exclusive factor which the courts consider in determining the law governing the validity of a trust. With few exceptions, New York courts have demonstrated an inclination to sustain a trust if they can do so through the

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[51] See Comment, 39 YALE L.J. 100, 103 n.14 (1929).

[52] *See* Shannon v. Irving Trust Co., 275 N.Y. 95, 103-105, 9 N.E.2d 792, 794 (1937); Cross v. United States Trust Co., 131 N.Y. 330, 341-343, 30 N.E. 125, 127-128 (1892); see Note, 32 COL. L. REV. 680, 682 (1932).

[53] The two apparent exceptions are Matter of Samuels, 205 Misc. 368, 128 N.Y.S.2d 349 (Surr. Ct. 1954), and Matter of Clarkson, 201 Misc. 943, 107 N.Y.S.2d 289 (Surr. Ct. 1951).

[54] See notes 29, 30, 32 and 47 *supra; see* Peabody v. Kent, 153 App. Div. 286, 290, 138 N.Y. Supp. 32, 35 (2d Dep't 1912).

application of either domiciliary or non-domiciliary law. The effect of this shifting rule is to impose a geographic limitation on the applicability of the New York Rule against Perpetuities. The Rule apparently applies only where a resident of New York establishes a trust to be administered in New York.[55] Depending on the weight of the *Samuels* case, however, non-charitable testamentary trusts may be excluded from this rather ideal limitation.

The New York Rule against Perpetuities will not apply to an inter vivos trust of personal property with a foreign situs; nor will it apply if the beneficiary of a testamentary trust is a foreign charity and the trust is to be administered in another jurisdiction. If, in the latter case, the beneficiary is not a charity, the law can only be described as uncertain.

STATE PROTECTION OF THE RIGHT TO WORK

Introduction

Governmental policy in the United States, echoing what is undoubtedly the sentiment of most Americans, has sought to encourage competition in industry. This has required the enactment of legislation against those who would combine in order to raise artificially the price of their goods, either directly or indirectly. Such laws, however, impinge upon the liberty of those whom they affect by preventing them from contracting as they wish. It is therefore necessary to subject all such legislation to the closest scrutiny to determine whether or not the liberty which it preserves is greater than that which it restricts.

In recent years many states have enacted so-called "right-to-work" [1] laws, which prohibit the conventional union shop contract and other union-security devices. These statutes would appear to come within the general category of legislation the purpose of which is the maintenance of competition, since the underlying rationale is

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[55] See 2 WHARTON, CONFLICT OF LAWS 1325 (3d ed. 1905).

[1] Terminology in this field is fraught with partisan overtones. Union leaders prefer to call these enactments "anti-union-security" laws, rather than "right-to-work" statutes. This is in harmony with their use of the term "union security" rather than "closed shop," "union shop," "maintenance of membership," *etc.* It cannot be denied that the term "right-to-work" is misleading, if it is understood to mean a literal right to be employed. Such a "right," though foreign to American political concepts, is common among authoritarian regimes. *E.g.*, ARGENTINA CONST. Art. XXXVII, § I(1); Spain: Labor Charter, Art. I, § 8; U.S.S.R. CONST. Art. CXVIII. In this article the terms "right-to-work" and "union security" will be employed in the interest of brevity and uniformity.